Filed 2/10/17 P. v. Ortega CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. GILBERT ORTEGA, Defendant and Appellant.	B271433 (Los Angeles County Super. Ct. No. BA430090)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman J. Shapiro, Judge. Affirmed.

Daniel Milchiker, under appointment by the Court of Appeal, for Defendant and Torres.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Colleen M. Tiedmann and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Gilbert Ortega of second degree robbery in violation of section 211 of the Penal Code,[1] and the trial court found Ortega had suffered various prior convictions, including a prior strike conviction (§ 667, subds. (b)-(j)) and a prior serious felony conviction (§ 667, subd. (a)). The court sentenced Ortega to an aggregate term of 11 years in state prison comprised of the mid-term of three years for the robbery, doubled to six years for the strike, plus five years for a prior serious felony. Ortega argues he was denied the right to testify in his own defense, and that the trial court erred in denying his *Marsden*[2] and *Faretta*[3] motions, and his motion to suppress evidence. We affirm.

FACTS

On September 21, 2014, Juan Abarca and his girlfriend, Brigitte Yosenia, decided to get something to eat at a taco truck. Abarca parked his car, and he and Yosenia walked and purchased food to eat. When they walked back to Abarca's car, Abarca and Yosenia found Ortega inside the vehicle. For a short instance, Abarca and Yosenia thought they had approached the wrong vehicle, and continued on. They quickly realized different, and returned to Abarca's car where Abarca asked Ortega what he was doing. Ortega responded by getting out of Abarca's car and saying, "You know what I got for you? It's a gun." When Abarca stepped backward, Ortega ran away. Abarca then discovered

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[1] All further undesignated section references are to the Penal Code unless otherwise noted.

[2] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

[3] *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

that a number of personal items were missing from his car, including an iPhone and a credit card.

On September 2, 2015, almost one year after Abarca had been robbed, Los Angeles Police Department (LAPD) Officers Miguel Herrera and Jose Bonilla searched Ortega after they found him in a parked van at about three or four o'clock in the morning. During this search, the officers found Abarca's iPhone and a credit card with Abarca's name on it. After finding Abarca's property, the officers contacted him. Shortly thereafter, Abarca and Yosenia were shown a six-pack line-up of photographs, and both picked Ortega's photograph as the robber. At trial, Abarca identified Ortega as the person who had been in Abarca's car when Abarca's property went missing; Yosenia testified that Ortega looked "similar" to the person she had seen in Abarca's car, but his hairstyle was different.

In November 2014, the People filed an information charging Ortega with the second degree robbery of Abarca. (§ 211.) Further, the information alleged that Ortega suffered a robbery conviction in 2004 that qualified as a strike and as a prior serious felony. (§§ 667, subds. (b)-(j)); 667, subd. (a).) The information alleged two prior convictions with a prison term. (§ 667.5, subd. (b).) The charges were tried to a jury in June 2015, at which time the prosecution presented evidence establishing the facts summarized above. Ortega did not present any evidence; his trial counsel urged the jurors to view the eyewitness testimony of Abarca and Yosenia as not sufficiently credible to sustain a guilty verdict. The jury returned a verdict finding Ortega guilty as charged. The trial court thereafter found, based on Ortega's admissions, that he suffered the prior

convictions alleged in the information. The court later sentenced Ortega as noted at the outset of this opinion.

DISCUSSION

I. The Right to Testify Claim

Ortega contends his robbery conviction must be reversed because the trial court violated his constitutional right to testify in his own defense. We disagree.

The Governing Law

"The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that 'are essential to due process of law in a fair adversary process.' [Citation.] The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony." (*Rock v. Arkansas* (1987) 483 U.S. 44, 51.) The right to testify belongs wholly to the defendant, and, thus, he or she may exercise the right even over the objection of, and contrary to the advice of, defense counsel. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1332.) At the same time, a defendant's right to testify is subject to common sense conditions. Specifically, the defendant must make both a "timely" and "adequate demand to testify." (See *People v. Alcala* (1992) 4 Cal.4th 742, 805 (*Alcala*).)

On appeal, a reviewing court in examining whether a violation of the right to testify occurred will apply the abuse of discretion standard to the trial court's determination of the elements of timeliness and the adequacy of the defendant's demand to testify. (*People v. Earley* (2004) 122 Cal.App.4th 542, 546-547.)

Where a reviewing court determines that a violation of the right to testify did occur, the violation is subject to harmless error analysis under the federal constitutional standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (Cf. *People v. Allen* (2008) 44 Cal.4th 843, 871-872 (*Allen*) [right to testify reviewed under constitutional harmless analysis in the context of a sexual predator proceeding].)

The Trial Setting

At the conclusion of the People's case, the trial court on the record indicated that the defense had advised the court that they would not be calling any witnesses, including Ortega. A short discussion followed on the issue of whether the People would be allowed to reopen their case to have Ortega show tattoos on his body. Shortly thereafter, in the presence of the jury, the court asked Ortega's counsel how the defense would like to proceed, and counsel announced that the defense was resting. The court then asked the prosecutor whether she had a request, and the prosecutor asked to reopen for the purpose of having Ortega show his tattoos. The court granted the request. During this process, the prosecutor asked if Ortega could pull his shirt sleeve a little bit open to show a tattoo, at which point the following exchange took place:

> "[Ortega]: I might as well. [¶] Can I say for the record, I was willing to testify, sir?
>
> "The Court: Sir, only if your attorney asks you to give evidence. [¶] All. Right. Mr. Ortega is more than complying. He's actually taking his shirt off, and he's exposing his upper body, arms, chest, stomach, at least most of the stomach area. [¶] All right Mr. Ortega, that's fine. Thank your very much.

[¶] Ladies and gentlemen, does everybody have a chance to --- all right. . . . All right. Miss [prosecutor], anything else at this time?

"[The Prosecutor]: Nothing, your honor. The People rest.

"The Court: All right. The People rest. [¶] Anything further by the defense?

"[Defense Counsel]: No, your honor.

"The Court: Okay. We'll give Mr. Ortega a chance to get comfortable. [¶] Ladies and gentlemen, I have a series of instructions I'm going to give you. . . ."

At no point during the remainder of the criminal proceedings did Ortega make any comment about testifying.

Analysis

The parties agree that the only issue on appeal is the issue of whether Ortega made an "adequate" demand to testify in his own defense. We find that Ortega did not make an adequate demand to testify. Further, even were we to accept that there was error, we would find the People have met their burden of showing that the error did not adversely affect Ortega's trial beyond a reasonable doubt under *Chapman*. (See *People v. Jackson* (2014) 58 Cal.4th 724, 793 [in examining a claim of constitutional error under the *Chapman* standard, the burden is on the state to demonstrate to the reviewing court that the error did not cause prejudice to the defendant].)

Neither Ortega in his opening brief nor the People in their respondent's brief have discussed any case explaining the quantum of clarity required for a defendant to make an

"adequate demand to testify." This said, we simply do not see that Ortega made such a request. At best, Ortega made an off-the-cuff remark as he was showing his tattoos: "I was willing to testify." He did not tell the trial court at that instant, or at any time, that he actually did "want" to testify, nor did he actually ask, request, or demand to be allowed to testify.

To avoid the conclusion that he did not make an adequate demand to testify, Ortega argues on appeal that the trial court should not have replied as it did to Ortega's "I was willing to testify" comment. He contends the trial court should have conducted an inquiry about the comment to determine whether Ortega actually did want to testify despite his counsel's repeated indications to the court that Ortega would not be testifying. Ortega cites *People v. Dent* (2003) 30 Cal.4th 213 (*Dent*) in support of his argument.

In *Dent*, the Supreme Court found that a trial court's response to a defendant's "conditional" comments about representing himself effectively "foreclosed any realistic possibility" that the defendant would consider self-representation to be "an available option." (*Dent, supra,* 30 Cal.4th at p. 221.) There, the trial court twice unequivocally stated that it would not let the defendant proceed as a self-represented litigant in a death penalty murder trial. The California Supreme Court found that the trial court had deterred the defendant from being able to develop and make the type of "unequivocal" request for self-representation that is required under *Faretta*.

Assuming that the law regarding *Faretta*'s requirement that a criminal defendant must make an "unequivocal demand" for self-representation before a trial court may allow a defendant to forego his or her legal counsel (see, generally *People v. Wright*

(1990) 52 Cal.3d 367, 409) should be the same as the law regarding the requirement that a defendant must make an "adequate demand" to testify (*Alcala, supra,* 4 Cal.4th at p. 805), *Dent* is readily distinguishable. Not only is it different because it deals with a defendant's assertion of his right to self-representation, and not a timely and adequate demand to testify, but also because the trial court here did not unequivocally shut down the possibility of Ortega testifying.[4] In sum, the *Dent* case is not helpful to Ortega.

In any event, we would find any error to be harmless under *Chapman*. The exclusion of a defendant's testimony is harmless error under a *Chapman* analysis when the facts to which he or she would have testified would not have affected the verdict. (*Allen, supra*, 44 Cal.4th at p. 872.) Here, Ortega argues on appeal that he indicated during two *Marsden* hearings that he would have testified (1) "that he was not in possession of the stolen items;" (2) "the reasons he was in the white van;"[5] and (3) "that he was 'innocent' of the robbery." We find any error harmless under *Chapman* because testimony of the nature as stated by Ortega, assuming that it would have been given as stated, would have been futile and would not have affected the jury's verdict.

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[4] We do, however, caution the trial court to be more careful in its statements to a defendant in such circumstances.

[5] At a motion to suppress hearing which we discuss below, a police officer testified that Ortega stated at the time he was found in the van that he was homeless and was looking for a place to sleep.

First, the reason that Ortega was in the white van was irrelevant to any issue involved in his robbery trial; the reason Ortega was in the van a year after the robbery had nothing to do with whether Ortega robbed Abarca a year earlier. Second, testimony that Ortega did not have Abarca's iPhone and credit card when he was searched would simply have been rejected as defying the physical evidence. We do not believe jurors would find Officers Herrera and Bonilla were carrying around Abarca's property when they encountered Ortega. We can think of no other scenario for why Abarca's iPhone and credit card became involved in Ortega's case if, in fact, those items had not been in Ortega's possession at the time he was searched. In summary, Ortega's defense would not have been helped had Ortega given implausibly wrong testimony.

This leaves only the prospect that the result of Ortega's case may have been different if only he gave testimony that he was "innocent" of the Abarca robbery. This testimony, of course, would have been given with a backdrop that he had prior convictions for robbery (§ 211) and taking a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)). It also would have been given against the identification of Abarca and Yosenia, and against the fact that he possessed Abarca's property. In short, the evidence overwhelmingly supported Ortega's conviction, and any testimony on his part would not have changed the result of his trial.

II. The First *Marsden* Motion Claim

Ortega contends his robbery conviction must be reversed because the trial court erred in denying his *Marsden* motion. We disagree.

The Trial Setting

At a pre-trial hearing on January 16, 2015, about six months before his trial, Ortega filled out a *Faretta* waiver form after defense counsel indicated to the trial court (Hon. Laura F. Priver) that Ortega wanted to represent himself. After receiving the waiver, the court began discussing the right to self-representation with Ortega, including the risks. During the course of these exchanges, Ortega made statements indicating his dissatisfaction with his appointed counsel, including the following comment:

> "At this point I'm just trying to make a conscious decision that's gonna help me better fight this case and at this time the requests I've been making I feel like I'm getting negative results so I don't know what else to do. Like I really don't—I would really much rather have an attorney and request maybe possibly getting an attorney that I can come to terms with as far as— "

On hearing Ortega's comment, the court decided that it should treat his request for self-representation as a request for a *Marsden* hearing. During an ensuing hearing outside the presence of the prosecutor, Ortega's counsel, Public Defender Susanne Blossom, told the court that it was true that she had not done certain things that Ortega wanted her to do, and then explained what Ortega wanted her to do, and why she had not done what he wanted. According to Blossom, Ortega wanted his case transferred to "Judge Rubin's court." When the court commented that Judge Rubin was retired, and that it was "impossible" to accommodate Ortega's desire, Blossom stated,

"right," to both aspects of the court's comments. Further, the court stated for its part that a party is not allowed to select a specific courtroom for a case in any event.

Blossom also informed the court that Ortega wanted Blossom to give the court some letters that he wrote to the court. Blossom stated that she had declined to do so because her case tactics "involve[d] not permitting [a] client to speak until the time they choose to testify."

Finally, Blossom stated that Ortega wanted Blossom to file a "Prop 47 petition." Her reason for not doing so "was because his open case in not a Prop 47 case," and the court agreed. Blossom added that Ortega's prior robbery conviction the information alleged was unaffected by Proposition 47.

At the end of the *Marsden* hearing, the court indicated that it would "keep [Ortega's *Faretta* waiver form] in the file without acting on them," and told Ortega that, if he changed his mind about wanting self-representation and wanted the court to act on his request for self-representation, then the court would "do that." Ortega replied, "Thank you."[6]

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[6] Given the totality of the exchanges during the hearing on January 16, 2015, we find the trial court impliedly found that Public Defender Blossom's representation of Ortega was not deficient, and that there was no irreparable breakdown in the attorney-client relationship affecting Ortega's right to the assistance of counsel. We acknowledge that the reporter's transcript shows no explicit ruling. The court's minute order states that Ortega's *Marsden* motion was denied.

Analysis

A defendant's constitutional right to assistance of counsel includes the right of an indigent defendant to have appointed counsel replaced when the failure to do so would substantially impair or deny the right to assistance of counsel. (*Marsden, supra*, 2 Cal.3d at p. 123.) At the same time, however, a defendant's right to appointed counsel does not include the right to demand the serial appointment of different lawyers until he or she finds a lawyer to his or her liking. (*People v. Ortiz* (1990) 51 Cal.3d 975, 980, fn. 1.) When a defendant seeks to discharge his or her appointed lawyer and substitute a new lawyer, *Marsden* dictates that the trial court must permit the defendant to explain the basis of his or her dissatisfaction. A defendant is entitled to relief when he or she shows that appointed counsel is not providing effective representation, or that there is an irreconcilable conflict in the relationship between the defendant and counsel such that ineffective representation is likely to result. (*People v. Streeter* (2012) 54 Cal.4th 205, 230.) A defendant is not entitled to relief merely because he or she disagrees with counsel over reasonable tactical decisions. (*People v. Memro* (1995) 11 Cal.4th 786, 858.)

When credibility questions arise between a defendant's assertions, and appointed counsel's explanations regarding the representation, it is within the trial court's credibility-determining role to accept counsel's explanations. (*People v. Smith* (1993) 6 Cal.4th 684, 696.) The court's ultimate task is to determine factually and legally whether appointed counsel's legal representation is constitutionally ineffective, or whether an irreconcilable conflict exists.

A trial court's decision to deny a *Marsden* motion is reviewed under the abuse of discretion standard. (*People v. Earp* (1999) 20 Cal.4th 826, 876.) A reviewing court will not find an abuse of discretion unless the defendant has shown that a failure to replace the appointed counsel actually resulted in a substantial impairment or denial of his or her right to assistance of counsel. (*People v. Hart* (1999) 20 Cal.4th 546, 603.)

Having reviewed the reporter's transcript of the *Marsden* hearing in light of the above-stated rules, we simply do not accept Ortega's argument that the trial court "fail[ed] to address [his]'s concerns" and "fail[ed] to question appointed counsel regarding those concerns." Here, the record shows the court conducted a hearing, and listened to what was going on. Public Defender Blossom's comments showed no more than that Ortega wanted his case to unfold in a manner that was not proper, and or that he had other ideas about the tactics which should have been being employed. We see no support for a conclusion that Public Defender Blossom was providing inadequate representation. Neither do we see any support for a conclusion that there was an irreconcilable breakdown in the relationship between Ortega and Public Defender Blossom. Ortega's opening brief makes allusions about Public Defender Blossom's "failure to investigate" Ortega's case, but we see no support for such an assertion in the record.

We add one final note on a matter that is not developed in the parties' briefs. At the time of Ortega's *Marsden* motion in January 2015, he was, as noted above, represented by Public Defender Blossom. However, by no later than May 2015, Ortega was represented by new appointed counsel, namely, Public Defender Saewon Yang. Public Defender Yang continued to represent Ortega through the time of his motion to suppress

(filed in May 2015 and heard in June 2015), and the time of his trial (in June 2015). We do not see how any complaints about Ortega's initial appointed counsel have anything to do with his case where new and different appointed counsel took over for the bulk of the case.

III. The Second *Marsden* Motion Claim

Ortega made another *Marsden* motion after the jury's verdict, on the day calendared for the hearing on the alleged priors and for his sentencing. Ortega contends his robbery conviction must be reversed because the trial court erred in denying his post-verdict *Marsden* motion. He argues that our court should, on reversal, remand his case with "directions for the trial court to substitute counsel to prepare a new trial motion . . . ." We find no ground for reversal.

We have set for the applicable law above. On the merits of Ortega's claim of post-verdict *Marsden* error, we find the trial court did not abuse its discretion in denying the motion. The reporter's transcript of the *Marsden* hearing shows that the court gave Ortega an opportunity to state his concerns regarding his counsel's representation. Ortega asserted that his motion to suppress had not been "vigorously pursued" by Public Defender Yang. Also, Yang had not issued a subpoena for the clothes that Ortega had been wearing when he was searched. Ortega asserted that his clothes would show that he did not have an iPhone in his pockets, because, according to Ortega, the shorts he was wearing "did not have pockets." As Ortega stated, his clothes would have been "exculpatory evidence." Finally, Ortega asserted that counsel should "file for retrial" based on his motion to suppress claim and clothes claim.

Throughout Ortega's exchanges with the court, the court indicated that Ortega was attempting to relitigate the motion to suppress, and found no merit in Ortega's assertions that the motion should have been granted. After listening to Ortega, the court asked Public Defender Yang to discuss Ortega's claim about his clothes. Yang explained that she had considered the probative value of the clothes that he had been wearing when searched as "very slight," and had focused instead on the victim's identification of Ortega as the robber. When the court asked whether the defense was considering filing a motion for new trial, Yang said, no, that she did not believe a new trial motion would be successful. Ortega further claimed that he asked his counsel file a *Romero* motion to dismiss his prior strike (see *People v. Superior Court (Romero*) 13 Cal.4th 497), but counsel had not done so. The court ultimately noted that Ortega's counsel indicated that she was going to file such a motion at the sentencing hearing.[7]

At the conclusion of the *Marsden* hearing, the court denied Ortega's motion, expressly finding that his counsel had not failed to present a defense or litigate the case adequately.

We find no abuse of discretion in the trial court's ruling to deny Ortega's post-verdict *Marsden* motion. First, with regard to the rule that a trial court must conduct a hearing into a defendant's complaints, the record belies any assertion that the court here did not do so. Second, with regard to the requirement that a defendant demonstrate that his her counsel provided inadequate representation, we see no deficiency. The record

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[7] In February 2015, Public Defender Yang filed a *Romero* motion. The court denied the motion at the sentencing hearing. Ortega does not challenge the court's ruling on appeal.

shows at most that Ortega disagreed with his counsel's tactics. There is no support for the assertion that Ortega's motion to suppress should have been a winner. Similarly, the assertion that a new trial motion should have been filed does not support a conclusion that Ortega suffered the results of deficient legal presentation. The record does not include material showing that a motion for new trial had a reasonable possibility of success. Ortega's claim about a failure to file a *Romero* motion was premature.

We have read the reporter's transcript from the hearing on Ortega's post-conviction *Marsden* motion and reject his contention that the trial court did not give him a fair hearing because the court was "hostile" to the motion. We acknowledge that the court made several comments to the effect that Ortega did not seem to understand the purpose of a *Marsden* hearing. All this considered, we do not see hostility to the motion, only rulings against the motion. The record does not support a claim that the court failed to afford a fair hearing on the motion.

IV. The *Faretta* Claim

Ortega next contends his robbery conviction must be reversed because the trial court erred in denying his request for self-representation under *Faretta*. We disagree.

The Governing Legal Principles

A criminal defendant has a federal constitutional right to represent himself provided that he or she voluntarily and intelligently elects to do so. (*Faretta, supra*, 422 U.S. at p. 836; and see, e.g., *People v. Windham* (1977) 19 Cal.3d 121, 124 (*Windham*).) But to invoke the right of self-representation, a defendant must assert the right "unequivocally" and "within a

reasonable time prior to the commencement of trial." (*Windham, supra*, 19 Cal.3d at p. 128.)

A trial court "should draw every reasonable inference against waiver of the right to counsel," and, for this reason, "the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied." (*People v. Marshall* (1997) 15 Cal.4th 1, 23 (*Marshall*); see also *People v. Tena* (2007) 156 Cal.App.4th 598, 607.)

A reviewing court must examine the entire record de novo to determine whether a defendant actually made an unequivocal request for self-representation. (*Marshall, supra*, 15 Cal.4th at p. 23; *People v. Danks* (2004) 32 Cal.4th 269, 295.)

Analysis

We find Ortega did not make an unequivocal request for self-representation as contemplated under *Faretta*. As summarized above, the record shows that, when the trial court began to discuss self-representation, Ortega responded as follows:

> " . . . I feel like I'm getting negative results [asking my counsel to do things] so I don't know what else to do. *Like I really don't—I would really much rather have an attorney and request maybe possibly getting an attorney that I can come to terms with as far as* — " (Italics added.)

As we noted, the trial court understood Ortega's comments to show that he truly wanted a *Marsden* hearing.

Ortega's comment cannot reasonably be construed as an unequivocal request for self-representation because he explicitly stated that he "would really much rather have an attorney," and that he was actually interested in "possibly getting an attorney that [he could] come to terms with." No more needs to be said. Ortega's language defeats any possible conclusion that he truly desired to represent himself. (*People v. Tena, supra*, 156 Cal.App.4th at p. 607.)

Even assuming Ortega made an unequivocal request to represent himself by requesting to fill out the court's *Faretta* waiver form, the record shows he abandoned his request for self-representation. The *Faretta* right, "once asserted, may be . . . abandoned." (*People v. Dunkle* (2005) 36 Cal.4th 861, 909, citing *People v. Skaggs* (1996) 44 Cal.App.4th 1, 8 (*Skaggs*) with approval.) In *Skaggs*, the Court of Appeal found a defendant abandoned his *Faretta* request where the court did not rule on an equivocal request for self-representation, and the defendant never mentioned the request again. (*Skaggs*, at pp. 7-8.) The reason for finding abandonment in such circumstances is to discourage "gamesmanship by preventing a defendant who realizes that his *Faretta* request has not been addressed from saving his '*Faretta* ace to play triumphantly on appeal.'" (*Id*. at p. 8, quoting *People v. Kenner* (1990) 223 Cal.App.3d 56, 62.)

We have an even stronger showing of abandonment in Ortega's present case. Here, Ortega made an equivocal request for self-representation, and, in response, the court actually did act on the request – it treated the request as a request for a *Marsden* hearing. At the conclusion of the hearing, the court expressly told Ortega that the court would keep his *Faretta* waiver form "in the file," in the event that Ortega wanted to

renew his request later in the case for self-representation. Ortega never did so. Finding abandonment of a *Faretta* request is appropriate in such circumstances. (*Skaggs, supra*, 44 Cal.App.4th at p. 8.)

V. The Motion to Suppress Claim

Ortega next contends his robbery conviction must be reversed because the trial court erred in denying his motion to suppress the items of Abarca's property that LAPD Officers Herrera and Bonilla found on Ortega's person when they searched him immediately outside the van in which the officers found him. Ortega asserts *Harvey-Madden* error,[8] arguing that the radio report that the officers received regarding a possible vehicle burglary was not corroborated, and, thus, the "the prosecution failed to establish the source of probable cause rendering [his] detention and search illegal under the Fourth Amendment." We find no error.

The Evidence

Officers Herrera and Bonilla testified at the hearing on Ortega's motion to suppress. The officers' testimony was consistent, and when viewed in support of the trial court's ruling as we must (*People v. Glaser* (1995) 11 Cal.4th 354, 362) established the following historical facts. On September 2, 2015, Officers Herrera and Bonilla were on patrol when they received a radio report between approximately 3:00 to 4:00 a.m. regarding a burglary from a motor vehicle. The report indicated that two male Hispanics were trying to break into a white van at the corner of 81st and Broadway. Upon arriving in the area, the officers saw Ortega in the front seat of a white van. At about the

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[8] See *People v. Harvey* (1958) 156 Cal.App.2d 516 (*Harvey*); *People v. Madden* (1970) 2 Cal.3d 1017 (*Madden*).

same instant, Ortega looked in the officers' direction and then "crouched down." The officers also saw a broken rear passenger window, and glass on the ground by the passenger's side of the van. The officers pulled their patrol car in front of the van, got out of the patrol car, and "ordered" Ortega out. While exiting on the passenger side of the van, Ortega tossed a screwdriver inside of the van on the floorboard. "Immediately" after Ortega got out of the van, the officers handcuffed him and "patted" him down "for officer safety." During a search of Ortega's pockets, the officers discovered a cell phone, credit cards, and fake identification. As noted above, further inquiry revealed that that the iPhone belonged to Abarca, and that Abarca's name was on one of the credit cards.

Analysis

The *Harvey-Madden* line of cases establishes the evidentiary rules that the prosecution must satisfy to "prove the underlying grounds" for an arrest or detention "when the authority to arrest [or detain] has been transmitted to the arresting officer through police channels." (*People v. Collins* (1997) 59 Cal.App.4th 988, 993.) *Harvey-Madden* is irrelevant in Ortega's present case because the radio report received by Officers Herrera and Bonilla is wholly unnecessary to consider in examining whether the officers lawfully searched Ortega. The radio report is needed for nothing more, if needed for anything at all, than to set a background context for why the officers drove to the area of 81st and Broadway at between 3:00 to 4:00 a.m. on September 2, 2016. The officers, with or without a radio report were entitled to drive their patrol vehicle to any public street area in the city that they wanted. The critical examination in this case is limited to whether, when the officers arrived in the

area of 81st and Broadway, they acted lawfully. The answer to that question is an easy yes.

When Officers Herrera and Bonilla arrived in the area of 81st and Broadway at between three to four in the morning, they saw a parked van with a broken window and glass on the ground, indicating the window had been broken fairly recently. They also saw Ortega in the van. At about the same time, Ortega saw the officers and tried to "crouch down." Under any reasonable determination of "reasonable suspicion" to investigate a possible crime, the officers acted properly. (See generally *Terry v. Ohio* (1968) 392 U.S. 1).) It is not correct, as Ortega says in his opening brief, that the officers "were acting on information they received through a radio [report]." The officers were acting on what they personally observed at the scene.

In investigating the situation, Officers Herrera and Bonilla were not, for safety reasons, prohibited from ordering Ortega to get out of the van. (Cf. *People v. Lomax* (2010) 49 Cal.4th 530, 564 [once a vehicle has been detained in a valid traffic stop, police officers may order the driver and passengers out of the car pending completion of the traffic stop without violating the Fourth Amendment].) Ortega offers no authority to dispute such a conclusion; he focuses his argument solely on the reliability of the facts relayed to the officers in the information, which, as we noted above, are irrelevant.

As Ortega was getting out of the van, the officers saw him throw a screwdriver onto the floorboard of the vehicle. At this point, the officers likely had probable cause to arrest him for vehicular burglary, but, even short of probable cause, they had articulable reason for conducting a pat-down search of his body for their own safety. Again, Ortega offers no legal authority to

dispute such a conclusion in that he focuses his argument only to the issue of the reliability of the facts relayed to the officers in the radio report, which, as we noted above, are irrelevant.

Because the officers lawfully investigated the situation of Ortega in a vehicle with a broken window, and lawfully conducted a search for their own safety, Ortega has failed to demonstrate that the trial court erred in denying his motion to suppress the items found during the search.

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.